

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DEMOCRACY FORWARD
FOUNDATION
1333 H Street, NW
Washington, D.C. 20005,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
ENERGY,
1000 Independence Ave., SW
Washington, D.C. 20585

Defendant.

Case No.

COMPLAINT FOR INJUNCTIVE RELIEF

Preliminary Statement

1. Plaintiff Democracy Forward Foundation brings this action against Defendant United States Department of Energy (“DOE” or “Department”) to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, in connection with FOIA requests seeking to illuminate the Department’s efforts to facilitate the transfer of sensitive nuclear technology to the Kingdom of Saudi Arabia (“Saudi Arabia”).

2. The proposed transfer—which could hasten the proliferation of nuclear weapons throughout the Middle East—has been championed by family and friends of the President who may benefit financially from the deal. Since the President’s inauguration, this cadre of advisors has worked to advance the transfer by attempting to circumvent the requirements of the Atomic Energy Act and by enlisting senior administration officials in their cause. Among these officials

is Secretary of Energy Rick Perry, who met repeatedly with his Saudi counterparts in 2017 and 2018 to discuss the proposed technology transfer.

3. To better understand efforts by Secretary Perry and Defendant to expedite the transfer of nuclear technology to Saudi Arabia, Plaintiff submitted a FOIA request on May 21, 2018. Defendant has not responded to Plaintiff's request as required by FOIA and Department regulations. Accordingly, Plaintiff respectfully asks this Court to order Defendant to respond to Plaintiff's FOIA request.

Jurisdiction and Venue

4. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

5. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

6. Because Defendant has failed to comply with the applicable time limit provisions of FOIA, Plaintiff is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

Parties

7. Plaintiff Democracy Forward Foundation is a not-for-profit organization incorporated under the laws of the District of Columbia and based in Washington, D.C. Plaintiff works to promote transparency and accountability in government, in part by educating the public on government actions and policies.

8. Defendant DOE is a federal agency within the meaning of FOIA, headquartered in Washington, D.C., and has possession, custody, and control of records Plaintiff seeks.

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Legal Background

9. Congress passed FOIA to promote and ensure government transparency and the expedient disclosure of government records. The Act codifies the public's right to access those records, which may only be withheld if the responding agency properly invokes one of nine narrow FOIA exemptions. *Id.* §§ 552(b)(1)-(9), (a)(4)(B).

10. Federal agencies must comply with strict FOIA deadlines upon receipt of a records request. The agency must "determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of . . . such determination and the reasons therefor." *Id.* § 552(a)(6)(A)(i).

11. The twenty-day period in which an agency must respond may be extended by written notice setting forth "unusual circumstances," as defined by statute. *Id.* § 552(a)(6)(B)(iii). The extension may be no longer than ten working days. *Id.* § 552(a)(6)(B)(i)(I).

12. Upon receipt of a FOIA request, an agency "shall make reasonable efforts to search for the records" responsive to the request. 5 U.S.C. § 552(a)(3)(C). The agency "shall make the [responsive] records promptly available," *id.* § 552(a)(3)(A), unless the agency can show that it may lawfully withhold all or portions of the requested records pursuant to the narrowly defined FOIA exemptions in 5 U.S.C. § 552(b).

Factual Allegations

13. Under Section 123 of the Atomic Energy Act, any nation receiving certain United States nuclear technology must agree to several nonproliferation criteria, including "a guaranty by the [transferee] that no material transferred pursuant to the agreement . . . and no material used in or produced through the . . . agreement . . . will be reprocessed, enriched or . . . otherwise

altered in form or content without the prior approval of the United States.”¹ This compact is known as a “123 Agreement,” and must be submitted to Congress prior to the proposed transfer.²

14. In February 2018, *The Wall Street Journal* reported that the Trump Administration has doggedly pursued a sale of United States nuclear technology to Saudi Arabia.³ Experts have noted that the transfer would generally increase the chances of nuclear proliferation in the Middle East,⁴ and Saudi Arabia has exacerbated these concerns by refusing proliferation controls such as bans on enriching uranium and reprocessing spent nuclear fuel.⁵

15. An Interim Staff Report (“Report”) of the House Oversight and Reform Committee details that one of the sale’s original proponents was General Michael Flynn, who in late 2016 served as both an advisor to the President-elect and as an employee of “IP3 International,” an energy consulting firm representing the American nuclear industry.⁶ In advance of his appointment as the President’s National Security Advisor, Flynn concealed his work for IP3, misreporting or failing to report two trips to Saudi Arabia when applying to renew his security clearance.⁷

16. Once in office, General Flynn treated the decision to transfer nuclear technology to Saudi Arabia as a *fait accompli*, and moved aggressively to implement the transfer, including

¹ 42 U.S.C. § 2153(a)(7).

² *Id.* § 2159.

³ Michael R. Gordon, Timothy Puko, & Summer Said, *U.S. Pursues Saudi Nuclear Deal, Despite Proliferation Risk*, Wall St. J., Feb. 20, 2018, <https://www.wsj.com/articles/saudi-resistance-to-nuclear-standards-could-roil-u-s-reactor-deal-1519122600>.

⁴ Matthew Fuhrmann, *The Trump Administration Wants to Sell Nuclear Technology to the Saudis – Without a Nuclear Agreement. That’s Alarming.*, Wash. Post, Feb. 21, 2019, https://www.washingtonpost.com/politics/2019/02/21/trump-administration-wants-sell-nuclear-technology-saudis-without-nuclear-agreement-thats-alarming/?noredirect=on&utm_term=.83e4df02dea3.

⁵ Gordon, Puko, & Said, *supra* note 3.

⁶ H. Comm. on Oversight and Reform, *Whistleblowers Raise Grave Concerns with Trump Administration’s Efforts to Transfer Sensitive Nuclear Technology to Saudi Arabia* 3 (Feb. 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Trump%20Saudi%20Nuclear%20Report%20-%202019-2019.pdf>.

⁷ *Id.*

by working with National Security Council advisor Derek Harvey to ignore career Department employees and the requirements of Section 123.⁸

17. On February 13, 2017, General Flynn resigned from his position as National Security Advisor in connection with false statements he had made to the Federal Bureau of Investigation related to his overseas contacts. Other senior government officials and members of the President's personal entourage have since led the Administration's efforts to bypass Congress and cement nuclear technology transfer to Saudi Arabia.

18. As the House Oversight and Reform Committee's Report explains, remaining proponents of the deal include Thomas Barrack, who chaired the President's Inaugural Committee and has reportedly raised billions from Saudi Arabia and the United Arab Emirates, and Jared Kushner, the President's son-in-law and close associate of Saudi Crown Prince Mohammad Bin Salman. In August 2018, Brookfield Asset Management—which owns IP3 client and nuclear developer Westinghouse Electric—purchased a 99-year lease on 666 5th Avenue, a Manhattan building owned by the Kushner family that had previously struggled to attract tenants and that has exerted a significant drag on Mr. Kushner's portfolio of real estate assets.

19. Secretary of Energy Rick Perry has also championed the transfer, which was the subject of meetings between Secretary Perry and his Saudi counterparts throughout 2017 and 2018.⁹ On May 9, 2018, Secretary Perry told Congress that in conversations with the Saudis, “we tried to really drive home to the Crown Prince that if you want the best reactors in world, you have to come to the United States and you have to use Westinghouse.”¹⁰

⁸ *Id.* at 4, 5, 7-8.

⁹ *Id.* at 19, 22.

¹⁰ *Id.* at 21.

20. To better understand and inform the public of Defendant's efforts to facilitate transfer nuclear technology to Saudi Arabia, Plaintiff submitted a FOIA request to DOE on May 21, 2018. *See* Ex. A. The request sought the following records:

- (1) Any and all records, including discussions of waivers and exceptions, relating to a nuclear cooperation agreement between the United States and Saudi Arabia pursuant to Section 123 of the Atomic Energy Act and including, but not limited to, correspondence to or from the following email domain: @meim.gov.sa
- (2) Any and all records, including correspondence with attachments, travel records including flight manifests, and interagency discussions, relating to the March 2018 meeting between Energy Secretary Rick Perry and Saudi Arabian Minister of Energy and Industry Khalid Bin Abdulaziz Al-Falih in London
- (3) Any and all records, including correspondence with attachments, travel records including flight manifests, and interagency discussions, relating to the November 2017 meeting between Energy Secretary Rick Perry and Saudi Arabian Minister of Energy and Industry Khalid Bin Abdulaziz Al-Falih
- (4) Any and all records, including correspondence with attachments, travel records including flight manifests, and interagency discussions, relating to the March 2017 meeting between Energy Secretary Rick Perry and Saudi Arabian Minister of Energy and Industry Khalid Bin Abdulaziz Al-Falih
- (5) Any and all communications between Department of Energy staff and the following entities relating to nuclear cooperation agreements between the United States and Saudi Arabia pursuant to Section 123 of the Atomic Energy Act:
 - Westinghouse (“@westinghouse.com”)
 - Exelon (“@exeloncorp.com”)
 - GE Hitachi Nuclear Energy (“@ge.com”)
 - SunPower Corporation (“@sunpowercorp.com”)
 - Toshiba (“@taec.toshiba.com”)
- (6) Any and all communications between Department of Energy staff and the following entities relating to nuclear cooperation agreements between the United States and Saudi Arabia pursuant to Section 123 of the Atomic Energy Act:
 - Pillsbury Shaw LLP (“@pillsburylaw.com”)
 - David B. Kultgen (“David.Kultgen@kultgenlaw.net” or “David.Kultgen@outlook.com”)
 - Gowling WLG LLP (“@gowlingwlg.com”)
 - King & Spalding LLP (“@kslaw.com”)

21. The Department received the request on May 21, 2018, sent an acknowledgement letter on May 23, 2018, and assigned the request control number HQ-2018-01136-F. *See* Ex. B.

22. DOE was required to make a determination on Plaintiff's FOIA request by June 18, 2018. *See* 5 U.S.C. § 552(a)(6)(A), (a)(6)(B)(i).

23. DOE has not rendered the required determination or otherwise complied with FOIA.

CLAIMS FOR RELIEF

Count One (Violation of FOIA by DOE), 5 U.S.C. § 552

24. Plaintiff repeats and incorporates by reference the foregoing paragraphs as if fully set forth herein.

25. By failing to respond to Plaintiff's request within the statutorily prescribed time limit, DOE has violated its duties under FOIA, including but not limited to its duties to conduct a reasonable search for responsive records and to produce all responsive, reasonably segregable, non-exempt information, and to not withhold responsive records. 5 U.S.C. § 552; 10 C.F.R. § 1004.5.

26. Plaintiff is being irreparably harmed by DOE's violation of the FOIA and will continue to be irreparably harmed until DOE is compelled to comply with the FOIA.

Request for Relief

WHEREFORE, Plaintiffs respectfully request that this Court:

1. order Defendant to conduct a search for any and all records responsive to Plaintiff's FOIA request using search methods reasonably likely to lead to discovery of all responsive records;

2. order Defendant to produce, by a date certain, any and all non-exempt responsive records and a *Vaughn* index of any responsive records withheld under a claim of exemption;
3. enjoin Defendant from continuing to withhold any and all non-exempt responsive records;
4. order Defendant to grant Plaintiff's requests for a fee waiver;
5. award Plaintiff its attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
6. grant Plaintiff such other relief as this Court deems just and proper.

Dated: February 28, 2019

Respectfully submitted,

/s/ Javier M. Guzman

Javier M. Guzman (D.C. Bar No. 462679)

Travis Annatoyn* (*pro hac vice* motion forthcoming)

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